No. ____

87-119 87-119

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

Supreme Court, U.S.
FILED
JUL 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

MICHAEL A. BOLDEN, SR.,

Petitioner,

—against—

AL ALSTON, SUPERINTENDENT, LINCOLN CORRECTIONAL FACILITY; NATHANIEL HAYES, SERGEANT; AND EDWARD KIRKLAND, SERGEANT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 6, 1987

QUESTIONS PRESENTED

In a civil rights action brought pursuant to 42 U.S.C. § 1983 (1982) based on alleged violations of petitioner's right to due process under the Fourteenth Amendment, the Second Circuit reversed the district court's grant of summary judgment in petitioner's favor on an appeal from an interlocutory order and, in doing so, ignored important legal principles set forth in this Court's controlling decisions while at the same time holding that its exercise of jurisdiction was proper.

This petition thus raises the following questions:

1. Whether the constitutional due process safeguards in the context of prison disciplinary proceedings as set forth by this Court in Wolff v. McDonnell, 418 U.S. 539 (1974), were compromised or overruled by the later decision in Hewitt v. Helms, 459 U.S. 460 (1983), as Hewitt was applied

by the Court of Appeals here, in a case -- unlike Hewitt -- involving official disciplinary intervention under non-exigent circumstances where petitioner was deprived of his state-created liberty interests in both freedom from unusually restrictive confinement and good time credits?

2. Whether the court of appeals exceeded its jurisdiction in deciding an appeal from an interlocutory order under the "collateral order" doctrine?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities.....	iv
Prior Opinions.....	1
Jurisdiction.....	2
Statutes Involved.....	2
Statement of the Case.....	3
A. Facts.....	4
B. Proceedings Below.....	10
Reasons for Granting the Writ.....	13
1. Inconsistency with this Court's Analysis.....	14
2. The Harmful Effect of the Court of Appeals' Decision.....	24
3. The Questionable Assertion of Federal Appellate Jurisdiction Below.....	25
Conclusion.....	33

TABLE OF AUTHORITIES

CASES:	Page
Anderson v. Dolce, 653 F. Supp. 1556 (S.D.N.Y. 1987).....	16
Bolden v. Alston, 810 F.2d 353 (2d Cir. 1987).....	1, 13, 17, 20, 29, 30
Bolden v. Alston, No. CV-82-2057 (E.D.N.Y. May 13, 1986) (Costantino, J.)(unreported)...	2, 10, 11, 12, 38
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).....	30, 31
Deane v. Dunbar, 777 F.2d 871 (2d Cir. 1985).....	22
Group Health Inc. v. Blue Cross Ass'n, 793 F.2d 491 (2d Cir. 1986), cert. denied, 107 S. Ct. 1566 (1987).....	29
Harlow v. Fitzgerald, 457 U.S. 800 (1982).....	12, 26, 28
Hewitt v. Helms, 459 U.S. 460 (1983).....	13, 18, 20, 21, 22, 28, 29, 30
Jacobson v. Coughlin, 688 F.2d 815 (2d Cir.), cert. denied, 459 U.S. 834 (1982).....	27
McCann v. Coughlin, 698 F.2d 112 (2d Cir. 1983).....	27
McKinnon v. Patterson, 568 F.2d 930 (2d Cir. 1977), cert. denied, 434 U.S. 1087 (1978).....	27

	Page
Memphis Community School District v. Stachura, 106 S. Ct. 2537 (1986)	31
Mitchell v. Forsyth, 472 U.S. 511 (1985)	25
Olim v. Wakinekona, 461 U.S. 238 (1983)	20
Ponte v. Real, 471 U.S. 238 (1983)	16
Powell v. Ward, 392 F. Supp. 628 (S.D.N.Y. 1975), aff'd as mod., 542 F.2d 101 (2d Cir. 1976)	27
Powell v. Ward, 643 F.2d 924 (2d Cir. 1981)	27
San Filippo v. U.S. Trust Co. of New York, 737 F.2d 246 (2d Cir. 1984), cert. denied, 470 U.S. 1035 (1985)	29, 31
Wolff v. McDonnell, 418 U.S. 539 (1974)	15, 16, 17, 21, 23, 24, 27
Wood v. Strickland, 420 U.S. 308 (1975)	26, 31
STATUTES AND REGULATIONS:	
42 U.S.C. § 1983	10, 31
Constitution of the United States, Amendment XIV	15, 20
7 N.Y.C.R.R. § 252.1	7
7 N.Y.C.R.R. § 252.2	6

Page

7 N.Y.C.R.R. § 252.4..... 19

7 N.Y.C.R.R. § 252.5..... 6, 19

7 N.Y.C.R.R. § 253.1..... 8

7 N.Y.C.R.R. § 253.2..... 8, 19

7 N.Y.C.R.R. § 253.3..... 19

7 N.Y.C.R.R. § 253.4..... 19

7 N.Y.C.R.R. § 300.2..... 7

No. _____

In The

Supreme Court of the United States

October Term 1987

MICHAEL A. BOLDEN, SR.,

Petitioner,

-against-

AL ALSTON, Superintendent, Lincoln Correctional Facility; NATHANIEL HAYES, Sergeant; and EDWARD KIRKLAND, Sergeant.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Michael A. Bolden, Sr. seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered on January 28, 1987 (petition for rehearing denied April 6, 1987).

PRIOR OPINIONS

The opinion of the court of appeals is reported at 810 F.2d 353 (2d Cir. 1987), and

appears at A. 01.* The unreported opinion of the United States District Court for the Eastern District of New York (Costantino, J.) appears at A. 17.

JURISDICTION

The judgment of the court of appeals, entered on January 28, 1987, appears at A. 01. The order of that court of April 6, 1987, denying a timely filed petition for rehearing and suggestion for rehearing en banc appears at A. 35. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the district court was based on 42 U.S.C. § 1983.

STATUTES INVOLVED

The pertinent text of each of the statutes involved appears as indicated:

42 U.S.C. § 1983 appears at A. 37.

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* References to the Appendix to this petition will be cited as "A. ".

The Fourteenth Amendment to the Constitution of the United States appears at A. 37.

7 N.Y.C.R.R. § 252.1 appears at A. 37.

7 N.Y.C.R.R. § 252.2 appears at A. 38.

7 N.Y.C.R.R. § 252.4 appears at A. 38.

7 N.Y.C.R.R. § 252.5 appears at A. 39.

7 N.Y.C.R.R. § 253.1 appears at A. 39.

7 N.Y.C.R.R. § 253.2 appears at A. 39.

7 N.Y.C.R.R. § 253.3 appears at A. 40.

7 N.Y.C.R.R. § 253.4 appears at A. 40.

7 N.Y.C.R.R. § 300.2 appears at A. 41.

STATEMENT OF THE CASE

Petitioner Michael A. Bolden, Sr. was, on June 16, 1982, a New York State prison inmate at the Lincoln Correctional Facility, a minimum security prison located in the Borough of Manhattan, City of New York. Respondents were State prison officials employed at Lincoln. On June 16, 1982, respondent Nathaniel Hayes charged Mr. Bolden with violating prison rules. Mr. Bolden, pursuant to the inmate misbehavior report

filed by Sgt. Hayes, appeared at two prison disciplinary proceedings at which his due process rights are alleged to have been violated. Petitioner is appealing to this Court from an order of dismissal based upon a reversal by the court of appeals of the district court's grant of his cross-motion for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure on the issue of liability alone. At the time of the reversal, a genuine issue existed as to the amount of damages and the district court had ordered further briefing on that issue. Additional proceedings on the issue of damages were held in abeyance pending resolution of respondents' appeal.

A. Facts. The undisputed facts before both the district court and the court of appeals are that on June 16, 1982, Mr. Bolden was an inmate at Lincoln with an open parole date of July 8, 1982. At about 2:15 p.m. that day, Mr. Bolden was in a basement area with three other inmates and a civilian maintenance supervisor for

whom he had been assigned to work. Earlier that day respondent Edward Kirkland had told Mr. Bolden to go outside and do some work. However, Sgt. Kirkland had advised Mr. Bolden some time earlier that his outside clearance had been revoked, so Mr. Bolden told Sgt. Kirkland he could not do what Sgt. Kirkland directed. Sgt. Kirkland responded that he would "get [Bolden] for this."

As Mr. Bolden was gazing through an overhead opening in an elevator shaft, Sgt. Hayes walked by on the street outside the building. It was undisputed below that Sgt. Hayes and Mr. Bolden had "a personal problem relating to [their] mutual interest in a civilian employee." Sgt. Hayes, seeing Mr. Bolden, made a joking comment about stepping on Mr. Bolden's nose. At about 10 p.m. that day Mr. Bolden was given a Notice of Report issued by Sgt. Hayes requiring him to appear at an Adjustment Committee hearing.* The notice informed Mr. Bolden that

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* An adjustment committee in New York is a three-member board whose role is "to

he was charged with violation of two rules and regulations, "out of place" and "abuse of privilege". Mr. Bolden, upon receipt of the notice, made inquiries and learned that none of the other three inmates present at the time of the alleged violations had been placed on report.

The following day, June 17, at 10 a.m., Mr. Bolden appeared, as directed, before the Adjustment Committee. He had not been advised of any right to call witnesses. The hearing was

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(Footnote Continued from Previous Page)

ascertain the full and complete facts and circumstances of the incidents of inmate misbehavior alleged in reports to the superindendent; to ascertain the underlying causes of each such incident; to take appropriate steps to secure future compliance by such inmates with the policies of the department; and to recommend . . . changes . . . as may seem desirable in order to eliminate, to the extent practicable, factors that tend to contribute to the causes of inmate misbehavior or to improve the methods of dealing with same." 7 N.Y.C.R.R. § 252.2. The three-member committee is granted limited disciplinary power and may order that an inmate be confined to his room (keeplock) or to a special housing unit. 7 N.Y.C.R.R. § 252.5(e).

conducted by respondent Kirkland alone.* As a result of this proceeding, Kirkland recommended that a Superintendent's Proceeding be conducted. Mr. Bolden was ordered confined to the facility's Special Housing Unit ("SHU").**

Mr. Bolden, while in the SHU, was advised of his right to choose a prison employee assistant to help him prepare for the Super-

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* An adjustment committee of one was permissible in facilities, such as Lincoln, where the population was fewer than 200 inmates. 7 N.Y.C.R.R. § 252.1(f). However, the power of a one-person adjustment committee was limited to imposing "loss of one or more specified privileges for a specified period not exceeding 30 days." 7 N.Y.C.R.R. § 252.5(e)(1). A one-person committee did not have the authority to impose confinement in a special housing unit.

** A special housing unit is "[a] cell or group of cells within a facility, maintained separate and apart from cells used by inmates in the general population, for confinement of inmates who are not in a program that permits them to commingle with the general inmate population." 7 N.Y.C.R.R. § 300.2(b).

intendent's Proceeding.* He chose Ms. Cynthia Morton. Mr. Bolden met with Ms. Morton and related to her his version (undisputed in this litigation) of the incident. He gave her the names of the other inmates who were present at the time of the alleged violations. Mr. Bolden further told Ms. Morton that the civilian maintenance supervisor for whom he worked, Livingston Forbes, had assigned him to the area in question. Ms. Morton advised Mr. Bolden of his right to call witnesses at the Superintendent's Proceeding. He told Ms. Morton and, later, during an interview in the SHU on June 22, respondent Spt. Alston, that he wished to avail himself of this right. He gave both Ms. Morton

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* A superintendent's proceeding is conducted by "the superintendent, a captain [or] some other employee" designated by the superintendent, 7 N.Y.C.R.R. § 253.2, when the superintendent is satisfied that there is "reasonable cause to believe that an inmate's behavior has constituted a danger to life, health, security or property, or that an inmate has deliberately failed or has refused to follow the guidance and counseling of the adjustment committee . . . ." 7 N.Y.C.R.R. § 253.1.

and Spt. Alston the names of the witnesses he wanted to call.

The Superintendent's Proceeding concluded on June 24. This meeting consisted of an interview between Mr. Bolden and Spt. Alston. None of the witnesses was present, although Spt. Alston advised Mr. Bolden that he had interviewed them all. Mr. Bolden protested the absence of witnesses but was given no explanation, either written or oral, for their absence. Ms. Morton had prepared no report in connection with her "assistance" to Mr. Bolden and, as the courts below noted, there is no evidence that Ms. Morton either provided any assistance to petitioner or conducted any kind of investigation on his behalf.

The Superintendent's Proceeding resulted in a dismissal of the "abuse of privilege" charge and the affirmance of the "out of place" violation alleged. Mr. Bolden was sentenced to time served and loss of privileges. Spt. Alston told Mr. Bolden that he was further recommending loss of 20 days good time, which recommendation

was adopted by the relevant authorities. As a result, Mr. Bolden's parole date was suspended the following day, June 25.

Following the Superintendent's Proceeding, Mr. Bolden requested and was granted a transfer from Lincoln. On July 14, 1982, while an inmate at the Arthur Kill Correctional Facility in Staten Island, New York, Mr. Bolden, pro se, initiated this action pursuant to 42 U.S.C. § 1983. One day later, he was released on parole.

B. Proceedings Below. In December 1984, respondents moved for summary judgment based upon a defense of qualified immunity. Mr. Bolden cross-moved on January 18, 1985 for the same relief on the issue of liability alone. On May 14, 1986, the district court issued its Memorandum of Decision and Order denying respondent's motion and granting petitioner's cross-motion. A. 17. In its opinion, the district court recognized Mr. Bolden's constitutionally protected, state-created liberty

interests in both good time credits and freedom from unusually restrictive confinement. A. 23-24. The district court rejected respondents' defense of qualified immunity and held that respondents had acted in violation of "clearly established" constitutional mandate in denying Mr. Bolden his right to due process at both stages of the prison disciplinary proceeding. A. 24-25.

The district court held that the state regulations in effect in June 1982 created a protected liberty interest in both good time credits and freedom from restrictive confinement. That interest could not be compromised without the benefit of the procedures mandated by both the state regulations and the controlling constitutional case law. The district court held that petitioner's due process rights had been violated by: (1) the deprivation of his right to 24 hours notice prior to the Adjustment Committee proceeding, A. 25; (2) the deprivation of his right to call witnesses and to

be advised of his right to call witnesses on his behalf at that hearing, A. 26; (3) an Adjustment Committee of one that was not authorized to order the restrictive confinement imposed, A. 28; (4) the failure of the Adjustment Committee to provide Mr. Bolden with a statement of the reasons for the absence of a right to call witnesses, A. 26; (5) the failure of the employee assistant to fulfill her responsibilities, A. 29; and (6) the dual role of Spt. Alston in both investigating the allegations and determining the punishment imposed at the Superintendent's Proceeding, A. 29-30.

Respondents, in their appeal, argued, inter alia, that they were shielded from liability under qualified immunity as articulated in Harlow v. Fitzgerald, 457 U.S. 800 (1982), since, according to their theory, it was not "clearly established law" in June 1982 that Mr. Bolden's confinement in the SHU was disciplinary and, therefore, they did not know nor should they have known that Mr. Bolden was entitled to his

due process rights. The court of appeals based its jurisdiction on the collateral order doctrine as enunciated in two prior Second Circuit decisions dealing with the defense of immunity. A. 07-08. It decided the appeal under Hewitt v. Helms, 459 U.S. 460 (1983), however, holding, in essence, that Mr. Bolden's due process rights were reduced because his confinement was "administrative". A. 10-11. In its opinion the court of appeals ignored completely the deprivation of Mr. Bolden's good time credits and the resulting suspension of his parole. The court of appeals further denied "Bolden's state law claims" although no state law claims were asserted either in the district court or on appeal. A. 13.

Petitioner sought rehearing, which was denied. A. 36.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed for three reasons.

(1) it directly and irreconcilably conflicts with applicable decisions of this Court;

(2) it will result in the rights of all New York State prison inmates at prison disciplinary proceedings being reduced or eliminated in the Federal courts, thereby rendering this question one of major significance; and

(3) it represents a significant departure from the standards controlling the exercise of Federal appellate jurisdiction under the "collateral order" doctrine.

1. INCONSISTENCY WITH THIS COURT'S ANALYSIS

Acknowledging that "[l]awful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen", this Court held that a prison inmate in this country is nonetheless "not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this

country." Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974). The Court noted that both good time credits and freedom from unusually restrictive confinement resulting from charges of misconduct, when provided for by the State, create liberty interests for the inmate of "real substance" which are worthy of the protections of the Fourteenth Amendment "to insure that the state-created right is not arbitrarily abrogated." Id. at 557. The Court then outlined a range of procedural protections required under the Fourteenth Amendment's Due Process Clause in disciplining prison inmates where such state-created liberty interests are present.

Included among those Wolff protections were the right of an inmate to 24 hours advance notice of the charges made against him, id. at 564; a "'written statement by the factfinders as to the evidence relied on and reasons' for the disciplinary action," id. (citation omitted); and the right of the inmate to "call witnesses . . . in his defense when permitting him to do so will

not be unduly hazardous to institutional safety or correctional goals," id. at 566. See also Ponte v. Real, 471 U.S. 491, 497-99 (1985) (Wolff right to call witnesses necessarily circumscribed by environment but not defeasible by officials' "unreviewable discretion" and inmate has right to require officials to explain denial of right at later court proceeding if record devoid of explanation). Implicit in the Wolff decision, furthermore, was the right to a sufficiently impartial decision maker. 418 U.S. at 570-71. The Court, on the facts before it, declined to rule that the Nebraska Adjustment Committee was not sufficiently impartial. Id. But see Anderson v. Dolce, 653 F. Supp. 1556, 1567 (S.D.N.Y. 1987), where Chief Judge Brieant, in denying a due process claim in a civil service case that a decision maker was not impartial, noted that "the fact that [superintendent of a correctional facility] controlled every aspect of [disciplinary] proceeding, conducted it, interviewed witnesses outside presence of inmate,

was the finder of fact, and ultimately passed judgment thereon, 'is not inconsistent with due process'" (citing Bolden v. Alston, 810 F.2d 353 (2d Cir. 1987)).

New York, in compliance with Wolff and directives from the Second Circuit, had, by 1982, gradually conformed most of its prison regulations to the Wolff guidelines. In fact, the State's prison regulations closely approximated those of Nebraska at the time of Wolff, (see 418 U.S. at 545-52 and nn. 5-6 and 8) and incorporated the Wolff language (e.g., 7 N.Y.C.R.R. § 253.4(b)(1) ("inmate shall be permitted to call witnesses . . . provided that so doing does not jeopardize institutional safety and correctional goals"), 418 U.S. at 566). Mr. Bolden, faced with the dual prospect of loss of good time and unusually restrictive confinement -- the same deprivations at issue in Wolff -- was denied virtually all of the Wolff protections.

Furthermore, petitioner asserts -- and the district court found -- additional due

process violations. This Court acknowledged again in Hewitt v. Helms, 459 U.S. 460, 471-72 (1983), that a state prison inmate, by virtue of state statutes and regulations, may "acquire a protected liberty interest in remaining in the general prison population." In order to determine whether the statutes created a protected liberty interest, this Court directed the lower Federal courts to look to the statutes and regulations at issue to examine the language used. If "the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates" is present, the conclusion necessarily follows that a state-created liberty interest exists. Id. at 472.

The regulatory provisions contained in the New York Codes, Rules and Regulations in June 1982 limited the discretion of prison officials in the manner in which they disciplined inmates. They contained the unmistakably mandatory language identified by this Court in Hewitt. Id.

at 471-72. (E.g., "[a]ll dispositions by the adjustment committee shall be in accordance with the provisions of this section," 7 N.Y.C.R.R. § 252.4(a); "where the committee is of the opinion that an inmate's behavior may have constituted a grave danger to life, health or security . . . the committee shall recommend . . .", 7 N.Y.C.R.R. § 252.4(b)(2); ". . . the committee shall recommend . . .", 7 N.Y.C.R.R. § 254(b)(3); committee of one "may only impose [limited] restriction . . .", 7 N.Y.C.R.R. § 252.5(e); "the formal charge shall consist . . .", N.Y.C.R.R. § 253.2(b); the employee assistant "shall investigate any reasonable factual claim . . .", 7 N.Y.C.R.R. § 253.3(b); "[a] written report shall be delivered [by the employee assistant] to the person appointed to conduct the proceeding prior to [its] commencement . . .", 7 N.Y.C.R.R. § 253.3(c); ". . . inmate shall be permitted to call witnesses . . .", 7 N.Y.C.R.R. § 253.4(b)(1); etc. (emphases added).) To the same extent as controlling case authority

suggests, therefore, the New York regulations do serve to provide an inmate with a liberty interest in freedom from loss of good time and from restrictive confinement without the protection of the Fourteenth Amendment safeguards set forth in Wolff. Accord, Hewitt v. Helms, 459 U.S. at 470-71 ("we conclude in light of the Pennsylvania statutes and regulations here in question . . . that respondent did acquire a protected liberty interest in remaining in the general prison population.") Cf., Olim v. Wakinekona, 461 U.S. 238, 249 (1983) ("Hawaii's prison regulations place no substantive limitations on official discretion and thus create no liberty interest entitled to protection under the Due Process Clause.")

Notwithstanding this clear judicial and regulatory authority, and notwithstanding its own observation that respondents have acknowledged that the proceedings against petitioner were disciplinary, A.01, 08 (cf., n.3), the court of appeals held that Mr. Bolden's confinement

pursuant to disciplinary charges was administrative under the 1983 Hewitt decision. Hewitt, however, is not applicable to this case and must be limited to its facts.

This Court held in Hewitt that the Pennsylvania statutory scheme providing for routine administrative confinement of prison inmates pending investigation into charges of misconduct requires a lower level of due process than that prescribed in Wolff. 459 U.S. at 472. In Hewitt the inmate was confined following a prison riot in order to protect other inmates and prison officials and to permit official investigation of his alleged involvement in the riot. Id. at 473. The Court balanced the interest of the inmate against that of both prison officials and the prison population, and found it wanting. His "private interest is not one of great consequence. . . . Unlike disciplinary confinement the stigma of wrongdoing or misconduct does not attach to administrative segregation under Pennsylvania's regulations.

Finally, there is no indication that administrative segregation will have any significant effect on parole opportunities." Id. (emphasis added).

New York, unlike Pennsylvania, has no statutory or regulatory scheme providing for routine administrative confinement pending resolution of disciplinary proceedings. See Hewitt, 459 U.S. at 463 n.1. Cf., 7 N.Y.C.R.R. § 252.4(b)(2) (adjustment committee "shall recommend to the superintendent that a superintendent's proceeding be held" if it is "of the opinion that an inmate's behavior may have constituted a grave danger . . . and that a disciplinary sanction is necessary . . .") (emphasis added). Unlike the situation in Hewitt, or that in Deane v. Dunbar, 777 F.2d 871 (2d Cir. 1985), the facts here are conclusive that there was no riot situation and that petitioner did not represent a danger, grave or otherwise, to anyone at Lincoln. Petitioner was not restrictively confined until nearly one full

day after the occurrence of the violations alleged. Respondents never contended either that petitioner's confinement was of an emergency nature or that petitioner was dangerous. Indeed, it is difficult to imagine more trivial charges and ones that were more arbitrarily brought and prosecuted against an inmate than those brought against Mr. Bolden.

By holding, in spite of the uncontroverted evidence below of punitive intent on the part of respondents, that petitioner's confinement in the SHU was administrative, the court of appeals minimized petitioner's state-created liberty interest in freedom from restrictive confinement. By ignoring Mr. Bolden's state-created liberty interest in good time credits, it acted in direct contravention of Wolff by sanctioning the plethora of due process violations at both stages of the disciplinary proceedings at issue in this case, thereby permitting respondents to deprive petitioner of his state-created and constitutionally protected

liberty interests without due process of law. The court of appeals thus ignored the fact that New York regulations do place significant substantive limitations on official discretion, precisely in the same way as Nebraska's regulations did in Wolff. See 418 U.S. 539 at 545-52, nn.5-6 and n.8.

This Court, it is respectfully urged, should grant certiorari to review the propriety of the court of appeals' decision in full consideration of controlling authority.

2. THE HARMFUL EFFECT OF THE COURT OF APPEALS' DECISION

The inevitable effect of the court of appeals' decision is clear. In New York, the State in which the Attica riot took place, prison officials will no longer hesitate to confine inmates in a Special Housing Unit or to deprive them of good time credits based on charges -- justified or otherwise -- of misconduct. They will not be constrained by the due process rights otherwise protecting inmates under both Wolff and the New York statutes and regulations (should

such statutes and regulations even survive). All punishment will be deemed "administrative" with the resultant diminution of inmates' minimal civil rights and their concomitant personal degradation. Prison officials will no longer hesitate to exercise arbitrary power over inmates' limited rights, knowing they can do so with impunity simply by invoking the rubric "administrative". A decision maker need not be at all impartial. There will no longer be constitutional due process required in disciplining prison inmates in New York.

Due to the importance of the questions involved, the decision of the court of appeals merits full review by this Court.

3. THE QUESTIONABLE ASSERTION OF FEDERAL APPELLATE JURISDICTION BELOW

In Mitchell v. Forsyth, 472 U.S. 511 (1985), this Court held that a decision rejecting a defense based on qualified immunity was appealable. It was on the authority of Mitchell that respondents based their appeal below.

Respondents' theory of qualified immunity at the district court was, as noted supra, that the rights of petitioner to due process were not based on "clearly established law" in 1982. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). This Court noted in no uncertain terms that a defense of "qualified immunity would be defeated if an official 'knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff] or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . . ." Id. at 815 (emphasis in original) (citing Wood v. Strickland, 420 U.S. 308, 322 (1975)).

Rejecting respondents' qualified immunity defense, the district court noted:

> "In 1976, it was conclusively established, in this Circuit, that Wolff procedures must be followed for both Adjustment Committee and Superintendent's Proceedings which may result in confinement to Special Housing as well as for deprivation of good time credit. Powell v. Ward, 392 F. Supp. 628 (S.D.N.Y. 1975), mod., 542 F.2d 101 (2d Cir. 1976) ('Powell I').
>
> "The determination by the Court in Powell I has been consistently reiterated. See, e.g., McKinnon v. Patterson, 568 F.2d 930 (2d Cir. 1977), cert. den., 434 U.S. 1087 (1978). (Keeplock for fourteen days is sufficient a deprivation to trigger due process protections); Powell v. Ward, 643 F.2d 924 (2d Cir. 1981) (The order issued in Powell I that Wolff due process procedures are required in Adjustment Committee and Superintendent's Proceedings is 'clear and unqualified'.)" A. 24-25.

The district court went on to discuss numerous Second Circuit cases in which the rights of inmates under Wolff were affirmed and applied. McCann v. Coughlin, 698 F.2d 112 (2d Cir. 1983); Jacobson v. Coughlin, 523 F. Supp. 1247 (N.D.N.Y. 1981), aff'd mem., 688 F.2d 815 (2d Cir.), cert. denied, 459 U.S. 834 (1982); McKinnon v. Patterson, 568 F.2d 930 (2d Cir. 1977); and Powell v. Ward, 542 F.2d 101 (2d Cir.

1976). The district court rejected respondents' defense of good faith immunity and concluded that it was "most disturbing that [respondents] again dredge up the claim that the prior decisions, such as Powell I, were limited to their particular facts. This argument has been rejected many times." A. 33.*

Notwithstanding this clear and unequivocal rejection of the long-discredited qualified immunity defense, respondents based their appeal to the court of appeals on that defense. They argued in the district court that they neither knew nor should have known, Harlow, supra, that they had violated petitioner's due process rights. On appeal they argued, however, that they neither knew nor should they have known, id., that the punishment inflicted upon petitioner was disciplinary, as opposed to "administrative" under Hewitt, supra.

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* The New York State Attorney General's office represented the defendant prison officials in all of the Second Circuit cases discussed above.

The court of appeals based its jurisdiction in this case on two of its own immunity decisions. Group Health Inc. v. Blue Cross Ass'n, 793 F.2d 491 (2d Cir. 1986), cert. denied, 107 S. Ct. 1566 (1987); San Filippo v. U.S. Trust Co. of New York, 737 F.2d 246 (2d Cir. 1984), cert. denied, 470 U.S. 1035 (1985). In Group Health, the Second Circuit dismissed the appeal of a denial of summary judgment, noting, "At this stage of the litigation the immunity issues presented are not solely questions of law." 793 F.2d at 497. It is submitted that questions of fact controlling the proper use of the Hewitt doctrine similarly must be held to exist in this case, precluding its application here.

However, notwithstanding that the court of appeals based its jurisdiction on the immunity defense, A. 07, the panel did not base its decision on -- or even consider -- that issue. Rather, asserting its pendent jurisdiction to decide the liability issue, A. 07-08, it decided

the appeal under Hewitt, which is not an immunity case. The assertion of pendent jurisdiction by the court of appeals, therefore, was unwarranted.

Appellate jurisdiction fails under the "collateral order" doctrine as set forth in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546-47 (1949). Cohen applies to final decisions of an interlocutory nature, i.e., "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Id. This, it is respectfully submitted, is not such a case. Indeed, the court of appeals expressly noted that the qualified immunity "defense [ ], if successful, would spare the [respondents] at most the burden of defending against determination of appropriate relief, now that liability has already been adjudicated." A. 07. The qualified immunity defense, however,

as recognized by the district court, was frivolous and improperly asserted. This holding was not addressed by the court of appeals. In dissenting from the denial of certiorari in San Filippo, supra, Justice White identified the problem that is starkly presented here in urging the strict application of the "collateral order" doctrine stated in Cohen. "Any other rule . . . would encourage the assertion of frivolous but appealable claims in order to obtain premature appellate review of otherwise unappealable 'pendent' claims." 470 U.S. at 1036 (White, J., dissenting). For this reason, it is submitted, the court of appeals' assertion of pendent jurisdiction was improper.

Malicious intent on respondents' part was forcefully alleged and uncontroverted below. It has been acknowledged by this Court to constitute a basis for the award of punitive damages under section 1983. Memphis Community School District v. Stachura, 106 S. Ct. 2537 (1986). See also Wood v. Strickland, supra

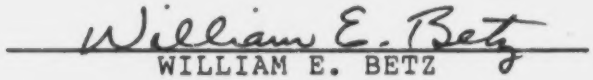
(qualified immunity defeated by malicious intent). Because the question of intent is crucial to a determination of whether the punishment inflicted upon petitioner could reasonably be held to be "administrative" and because the question of respondents' intent is one of fact properly determined by the trial court, it is urged that this Court grant certiorari to consider whether the court of appeals' January 28, 1987, decision should be reversed and vacated as based on a non-appealable order and whether this matter should be remanded to the district court for further proceedings on damages.

CONCLUSION

The decision below is inconsistent and irreconcilable with this Court's decisions controlling the due process rights to be accorded prison inmates under the Fourteenth Amendment to the Constitution of the United States. It further raises significant questions concerning the proper exercise of federal appellate jurisdiction under the "collateral order" doctrine. The petition for certiorari should be granted and the judgment reversed.

Dated: July 6, 1987

Respectfully submitted,



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APPENDIX

Bolden v. Alston,

310 F.2d 353 (2d Cir. 1987)

Michael A. Bolden, Sr., Plaintiff-Appellee,
v.
Al Alston, Superintendent, Lincoln Correctional Facility; Nathaniel Hayes, Sergeant; and Edward Kirkland, Sergeant, Defendants-Appellants.

No. 298, Docket No. 86-2219.

United States Court of Appeals,
Second Circuit.

Argued October 24, 1986.

Decided January 28, 1987.

Before KAUFMAN, NEWMAN, and PRATT, Circuit Judges.

NEWMAN, Circuit Judge:

This interlocutory appeal, challenging the denial of qualified immunity, concerns the procedural due process rights to which a state inmate is entitled in prison disciplinary proceedings. Three New York prison officials appeal from an order of the District Court for the Eastern District of New York (Mark A. Costantino, Judge) denying their immunity defense and holding them liable for failure to accord Michael Bolden due process of law in two prison hearings. For reasons that follow, we reverse and direct entry of judgment for the defendants.

Background

The prison hearings concerned charges lodged by Sergeant Nathaniel Hayes, an officer at the Lincoln Correctional Facility (Lincoln), against Bolden, then an inmate at Lincoln. On June 16, 1982, as he approached the prison to report to work, Hayes allegedly saw Bolden standing in a below-grade area near a freight elevator and peering out through an opening accessible to the street. Claiming that Bolden's head was raised above the building line, Hayes filed an inmate misbehavior report charging Bolden with violating two prison rules -- "out of place" and "abuse of privileges." At approximately 10:00 p.m. that evening Bolden received notice that these charges had been filed and that he was required to appear before the Adjustment Committee at 10:00 a.m. the following day. He was never notified of a right to call witnesses at the Adjustment Committee Proceeding.

The Adjustment Committee was a committee of one -- Sergeant Edward Kirkland.[1/] After reading the charges to Bolden and allowing him an

opportunity to respond, Kirkland told Bolden he would recommend a Superintendent's Proceeding. Bolden was then "remanded,"[2/] pending the outcome of the Superintendent's Proceeding, to a Special Housing Unit (SHU), a more restrictive form of confinement. The parties dispute whether that confinement was ordered by Kirkland or merely recommended by Kirkland and later adopted by Superintendent Alston. The record is clear, however, that later that day Alston adopted Kirkland's recommendation to convene a Superintendent's Proceeding.

In the five days intervening between the Adjustment Committee Proceeding and the beginning of the Superintendent's Proceeding, Bolden was apprised of various rights accorded him under state and federal law in connection with the latter forum. First, Alston notified him of his state statutory right to choose an employee to assist him in preparing for the Superintendent's Proceeding. Second, Bolden was served with formal charges more than twenty-four hours before

the Superintendent's Proceeding convened. Third, Bolden was informed that he was entitled to call witnesses on his behalf "provided that so doing does not jeopardize institutional safety or Correctional goals."

The Superintendent's Proceeding, which convened on June 22 and concluded on June 24, consisted of eight interviews conducted by Alston alone. Afterwards, Alston sustained the "out of place" charge and sentenced Bolden to time served in the SHU and denial of certain privileges. In addition, Alston recommended that Bolden lose twenty days of his "good time" credits. Based on this recommendation, the Time Allowance Committee suspended Bolden's scheduled release date of July 8, 1982; he was ultimately released on July 15, 1982.

While still in custody, Bolden filed suit under 42 U.S.C. § 1983 (1982) against Hayes, Kirkland, and Alston, seeking injunctive relief as well as compensatory and punitive damages. He claimed that the Adjustment Committee and Superintendent's Proceedings violated his rights

to due process and equal protection of the law. The state moved for summary judgment based on qualified immunity; Bolden moved for summary judgment on the merits.

Assessing the cross-motions for summary judgment, the District Court found that appellants had deprived Bolden of his liberty without due process of law. The District Judge identified three categories of procedural violations; first, in the Adjustment Committee Proceeding, appellants did not accord Bolden due process rights mandated in Wolff v. McDonnell, 418 U.S. 539 (1974), including twenty-four hours' notice prior to the proceeding and either notification of a qualified right to call witnesses or an explanation why witnesses may not be called; second, in both proceedings appellants failed to follow procedures mandated by state statutes; and third, in the Superintendent's Proceeding, Alston violated Bolden's rights by impermissibly assuming the dual roles of investigator and arbiter. Concluding that these rights had been clearly established by June 1982,

the District Judge rejected appellants' defense of official good-faith immunity. The District Judge granted summary judgment to Bolden on the issue of liability and directed the parties to submit briefs for a separate determination of injunctive relief and damages,

Hayes, Kirkland, and Alston invoke the collateral order doctrine, Mitchell v. Forsyth, 105 S. Ct. 2806, 2817 (1985), to appeal the adverse ruling on qualified immunity. They contend that, even if they deprived Bolden of some due process rights, they did not contravene clearly established law and are therefore entitled to qualified immunity.

Discussion

At the outset we encounter a jurisdictional problem. This is an interlocutory appeal of a denial of qualified immunity in a case already decided on the merits, at least as to liability. A final judgment has not been entered, however, since the issue of relief remains to be determined. Ordinarily an order

denying qualified immunity on undisputed facts is an appealable order, see Mitchell v. Forsyth, supra, though it is not self-evident that an interlocutory appeal should be available to vindicate a defense that, if successful, would spare the defendants at most the burden of defending against determination of appropriate relief, now that liability has already been adjudicated. Even if an interlocutory appeal is normally available in such circumstances, this case presents a further complication: as will subsequently appear, the issue of qualified immunity is inextricably bound up with the merits of at least one of Bolden's claims. Where that relationship exists, we would normally be obliged to dismiss the appeal and thereby permit the merits to be adjudicated in the District Court. See Group Health Inc. v. Blue Cross Ass'n, 793 F.2d 491, 497 (2d Cir. 1986). However, since the District Judge has already adjudicated the merits of the liability issue, we can entertain the appeal of the denial of qualified immunity and exercise pendent jurisdiction to review the

liability determinations. Cf. San Filippo v. United States Trust Co. of New York, Inc., 737 F.2d 246, 255 (2d Cir. 1984), cert. denied, 470 U.S. 1035 (1985). In considering the issues before us, it will be helpful to deal separately with each of the three categories of alleged due process violations.

1. Concerning the alleged denial of Wolff rights at the Adjustment Committee Proceeding, appellants first contend that Bolden's entitlement to such rights had not been clearly established by June 1982. They also contend that the 1983 Supreme Court decision in Hewitt v. Helms, 459 U.S. 460 (1983), established that Wolff rights are not constitutionally required in connection with interim confinement pending disciplinary proceedings. Since we are to apply the law now in effect to this appeal pending on direct review, see Bradley v. School Board, 416 U.S. 696, 711 (1974), we must consider the application of Helms to appellants' liability.

In Hewitt v. Helms, supra, the Supreme Court relaxed the due process requirements for

prison inmates placed in restrictive confinement for "administrative" as contrasted with "disciplinary" purposes. Helms, an inmate in a Pennsylvania prison, was confined to administrative segregation without benefit of Wolff rights while his role in a prison riot was investigated. Prison officials cited threats to security as well as the ongoing investigation as reasons for prolonging Helms' administrative segregation. The Supreme Court held that the confinement did not violate the Fourteenth Amendment. Recognizing "that prison officials have broad administrative and discretionary authority over the institutions they manage and that lawfully incarcerated persons retain only a narrow range of protected liberty interests," Hewitt v. Helms, supra, 459 U.S. at 467, the Court held that, unless state law created a liberty interest in remaining in the general prison population, administrative confinement is not subject to due process protection.

Even where statutes create a liberty interest in remaining in the general prison

population, however, Helms held that an inmate confined for administrative reasons need receive only minimal due process rights -- "some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation," Hewitt v. Helms, supra, 459 U.S. at 476. The more extensive procedural protections of Wolff were thereby limited to confinement for disciplinary reasons. Thus, Helms established that the level of procedural protection differs according to the purpose of the confinement.

Appellants do not contest that Bolden had a liberty interest in remaining in the general prison population. But they argue that because Bolden, like Helms, was confined pending disposition of a misconduct charge, his confinement following the Adjustment Committee Proceeding need satisfy only the lesser due process standard set out in Helms. We agree. Whether Bolden was ordered into confinement in the SHU by Kirkland or by Alston, that

confinement was an administrative measure taken pending the convening of a Superintendent's Proceeding. No violation was adjudicated by the Adjustment Committee Proceeding, and no disciplinary sanction was imposed. Like Heims, Bolden was administratively separated from the general prison population pending a disciplinary hearing.[3/] Since Bolden had been informed of the charges and was given an opportunity to respond, he received the minimal due process rights required for this type of administrative confinement. Whether or not appellants have qualified immunity against Bolden's claim concerning the confinement that followed the Adjustment Committee Proceeding, there is no liability for that confinement.

2. There is also no basis for imposing liability upon Alston for his allegedly dual role at the Superintendent's Proceeding. The District Court found that Alston "controlled every aspect of the Proceeding: he conducted it, he interviewed the witnesses outside of Bolden's presence, he was the finder of fact, and he

ultimately passed judgment thereon." Alston's conduct, however, is not inconsistent with the requirements of due process. In Powell v. Ward, 392 F. Supp. 628, 633 (S.D.N.Y. 1975), the District Court ruled that a prison official who had acted as an investigative officer could not serve as a hearing officer with respect to the incident investigated. On appeal, the provision of the District Court's injunction barring such a dual role was not challenged. Powell v. Ward, 542 F.2d 101, 103 (2d Cir. 1976). Even if such a dual role would violate due process in the prison context, Alston did not act in the dual capacities of the prison official in Powell. In that case the prison official had conducted an investigation and later served on Adjustment Committees adjudicating the matters investigated. Powell v. Ward, supra, 392 F. Supp. at 633. In the instant case, Alston conducted no investigation prior to the Superintendent's Proceeding. His interviews of witnesses, tape recorded and transcribed, reflect

that he was functioning as the presiding officer of the Superintendent's Proceeding, developing a formal hearing record. To the extent that he took testimony from witnesses out of Bolden's presence, he did not violate any due process requirement. See Baxter v. Palmigiano, 425 U.S. 308, 322 (1976). Because Alston's conduct at the hearing did not impair any due process rights to which Bolden was entitled, no liability exists.

3. Finally, Bolden's state law claims are not a basis for liability in this suit. State procedural requirements do not establish federal constitutional rights. Cofone v. Manson, 594 F.2d 934, 938 (2d Cir. 1979). See Deane v. Dunbar, 777 F.2d 871 (2d Cir. 1985). At most, any violation of state procedural requirements would create liability under state law, and, since the section 1983 claims fail on the undisputed facts, this is not an appropriate case for the exercise by the District Court of pendent jurisdiction over state law claims.

Since none of the defendants has violated any of Bolden's constitutional rights,

the order appealed from must be reversed and the case remanded with directions to enter judgment for the defendants.

F O O T N O T E S

1/ Under the statutes in effect in June 1982, the Adjustment Committee of a correctional facility like Lincoln that housed fewer than 200 inmates need consist of only a single prison official. 7 N.Y.C.R.R. § 252.1(f) (1978). The disciplinary authority of such an Adjustment Committee was limited, however. It could impose no greater punishment than loss of privileges. 7 N.Y.C.R.R. § 252.5(e) (1978).

2/ The term "remanded" is used in the form Kirkland sent Alston reporting on the recommendation of the Adjustment Committee.

3/ In their brief the appellants confuse matters by calling Bolden's confinement "disciplinary," and at the same time distinguishing it from what they call "punitive" confinement. We see nothing in Helms to suggest that the Supreme Court contemplated three levels of due process protection -- scaled for "administrative," "disciplinary," and "punitive"

confinement. The distinction the Court made is between "administrative" and "disciplinary" confinement. The latter refers to confinement imposed for the purpose of punishment after an adjudication of responsibility for some breach of prison regulations. Bolden's confinement was not "disciplinary" in the sense that the Supreme Court uses that term.

Bolden v. Alston,

No. CV-82-2057 (E.D.N.Y. May 14, 1987)

MICHAEL BOLDEN, SR., Plaintiff.

v.

AL ALSTON, SUPT., et al., Defendants.

NO. CV-82-2057

United States District Court,
E.D. New York.

May 13, 1986

MEMORANDUM OF DECISION AND ORDER

COSTANTINO, District Judge:

Plaintiff, Michael Bolden, Sr., ("Bolden") brings this action against defendants, Al Alston ("Alston"), Nathaniel Hayes ("Hayes"), and Edward Kirkland ("Kirkland"), individually and in their official capacities with the New York State Department of Correctional Services, pursuant to 42 U.S.C. §1983.

Plaintiff alleges that he was deprived of his Fourteenth Amendment right to procedural due process of law due to defendants' failure to follow applicable regulatory and court-mandated procedures during a prison Adjustment Committee

hearing as well as during a prison Superintendent's Proceeding.

Plaintiff seeks injunctive and declaratory relief as well as damages.

The matter is before the court on cross-motions for summary judgment. The facts are not in dispute.

FACTS

Bolden was an inmate at the Lincoln Correctional Facility in New York City on June 16, 1982. On that day at approximately 2:15 p.m., Bolden and three other inmates were standing in a below grade area located near a freight elevator which led to the street.

Sgt. Hayes was walking on the street and saw Bolden through the elevator shaft. Hayes stepped onto a metal plate or grating and joked with Bolden about stepping on his nose.

At 10:00 p.m. on June 16, Bolden was given a Notice of Report ("Report") issued by Hayes which charged Bolden with violations of two prison rules and regulations, viz.: 3.30.13 "Out

of Place (or leaving an assigned area)"; 3.30.1 "Abuse of Privileges (wrong or improper use of any benefit allowed by facility staff)."

The Report advised Bolden to appear before the Prison Adjustment Committee at 10:00 a.m. the next morning. Bolden was not informed of any right to call witnesses on his behalf.

The Adjustment Committee consisted of one officer, Sgt. Kirkland. At the hearing, Kirkland informed Bolden as to the nature of the charges, and he advised Bolden that he would recommend a Superintendent's Proceeding ("Proceeding") with respect to those charges. Thereupon, Kirkland ordered Bolden confined to the Special Housing Unit ("SHU").

During his stay in the SHU, Bolden was given formal notice of the charges against him and a date was scheduled for the Proceeding. The notice informed him that Cynthia Morton ("Morton"), a civilian prison employee, had been assigned to assist him in preparing for the proceeding. Additionally, Bolden was advised of a qualified right to call witnesses on his behalf.

Prior to the proceeding, Bolden met with Morton. He advised Morton of his version of the events as well as the names of the witnesses he wished to call. Apparently Bolden's meeting with Morton was worthless as there is no evidence that she took any action thereupon.

The Proceeding was held on June 22, 1982 at 10:45 a.m. before Supt. Alston. Alston advised Bolden of the charges against him. No mention was made of Bolden's right to call witnesses on his behalf.

Alston related Hayes' version of the incident to Bolden. Bolden, who was given the opportunity to speak, contended that he had authority to be in the area. Bolden also told Alston the names of the three inmates who were in the area near the freight elevator with him.

The Proceeding concluded with Alston telling Bolden that he was going to interview other people and then he would again meet with Bolden.

On June 22 and 23, 1982, Alston interviewed the three other inmates. Alston also interviewed Livingston Forbes, who is the general mechanic at Lincoln, as well as Hayes, Kirkland and Lieutenant Meisen. The interviews were taken outside of Bolden's presence, but the interviews were recorded.

Although Bolden expressed a desire to call witnesses, none were called, and there was no explanation for this.

Alston again met with Bolden. Alston told Bolden that the "Abuse of Privilege" charge was to be dismissed. The "Out of Place" charge was sustained.

Bolden was sentenced to time served in the SHU and denial of privileges. Additionally, Alston recommended to the Time Allowance Committee that Bolden lose twenty days of his "good time."

The recommendation was adopted, resulting in the postponement of Bolden's scheduled release date of July 8, 1982.

DISCUSSION

Although plaintiff does not enjoy the same protected liberty interests as one who is not incarcerated, he is not "wholly stripped of all constitutional protections." Wolff v. McDonnell, 418 U.S. 539, 555 (1973). It is immediately apparent to this court that the interest here is of constitutional dimension. Hewitt v. Helms, 459 U.S. 460, 472 (1983); Sher v. Coughlin, 739 F.2d 77, 81 (2d Cir. 1984).

Since the due process clause of the Fourteenth Amendment does not create a liberty interest in remaining in the general prison population, see Hewitt v. Helms, 459 U.S. 460, 468 (1983), plaintiff must rely on New York law. State law creates a liberty interest for due process purposes if state statutes or regulations place substantive limitations on the discretion of the relevant decision-maker to place an inmate in restrictive confinement. Deane v. Dunbar, _____ F.2d ___ , slip op. Nos. 1456, 1726 at 6756 (2d Cir. November 26, 1985) citing Hewitt

at 471-72; Sher v. Coughlin, 739 F.2d 77, 81 (2d Cir. 1984).

In Wolff, Nebraska had provided a statutory right to good time credits, specifying that the credits could be forfeited only for "serious misconduct." Id. at 557. The Court decided that if the state creates both a statutory right to credits and a standard regarding the allocation and revocation of those credits,

> the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures ... required by the Due Process Clause to insure that a state-created right is [not] arbitrarily abrogated.

Id. at 557.

The Wolff procedures which are to be followed in prison disciplinary proceedings are: (1) the inmate is to be given written formal notification of the charges at least twenty-four hours before a hearing; (2) at the hearing, the inmate may call witnesses so long as there is no

security risk; (3) when the hearing is concluded, the inmate is to be given a written statement of the evidence relied on and the reasons for any action taken. Id. at 564-566.

In 1976, it was conclusively established, in this Circuit, that Wolff procedures must be followed for both Adjustment Committee and Superintendent's Proceedings which may result in confinement to Special Housing as well as for deprivation of good time credit. Powell v. Ward, 392 F. Supp. 628 (S.D.N.Y. 1975), mod., 542 F.2d 101 (2d Cir. 1976) ("Powell I").

The determination reached by the Court in Powell I has been consistently reiterated. See, e.g., McKinnon v. Patterson, 568 F.2d 930 (2d Cir. 1977), cert. den., 434 U.S. 1087 (1978). (Keeplock for fourteen days is sufficient a deprivation to trigger due process protections); Powell v. Ward, 643 F.2d 924 (2d Cir. 1981) (The order issued in Powell I that Wolff due process procedures are required in

Adjustment Committee and Superintendent's Proceedings is "clear and unqualified.")

> [a]n inmate who is facing prison disciplinary charges that could result in punitive segregation is entitled, at a minimum, to advance written notice of the charges against him and of the evidence available to the factfinder. He must be permitted to marshal the facts and prepare his defense. A written record of the proceedings must be kept. The inmate must be allowed to call witnesses and present documentary evidence in his defense. [Wolf v. McDonnell, 418 U.S. 539], 564-66 (1974); McCann v. Coughlin, 698 F.2d 112, 120-21 (2d Cir. 1983).

Patterson v. Coughlin, 761 F.2d 886 (2d Cir. 1985)

FAILURE TO FOLLOW WOLFF

It is clear and undisputed that Bolden was not given the mandatory twenty-four hours notice before the Adjustment Committee hearing on June 16. In fact, Bolden was only given twelve hours notice prior to the Adjustment Committee hearing.

If there was any doubt as to whether Wolff applied to Adjustment Committee hearings,

that doubt was removed in 1977. See McKinnon v. Patterson, supra.

Furthermore, Bolden was not advised, at the hearing, of his qualified right to call witnesses on his behalf. It is clear that such a right existed in 1982. Powell I; Jacobson v. Coughlin, 523 F. Supp. 1247 (N.D.N.Y. 1981), affd. mem., 688 F.2d 815 (2d Cir. 1982), cert. den., 459 U.S. 834 (1982). There is no explanation in the record for the absence of the opportunity to call witnesses. While a written explanation need not have been given to Bolden as of right, there must be some support in the record for the denial of the request to call witnesses. Majid v. Henderson, 533 F. Supp. 1257, 1273 (N.D.N.Y. 1982).[1]

FAILURE TO FOLLOW STATE LAW GUIDELINES

Bolden alleges that his Fourteenth Amendment rights were violated in that the Adjustment Committee and Superintendent's Proceedings were not held in accordance with the

procedural guidelines established by New York State. 7 N.Y.C.R.R. §§252.1-253.4.

Bolden's claim is essentially based upon Hewitt v. Helms, 459 U.S. 460, wherein the Supreme Court held at 472 that "the repeated use of explicitly mandatory language in connection with requiring specific predicates" can give rise to a protected liberty interest.

Accordingly, when the language contained in the guidelines do not allow the exercise of discretion on the part of prison officials, but rather mandate the procedures to be followed, the failure of state prison officials to follow those procedures violate the protected liberty that the state has created.

The question thus presented is whether New York State, in enacting procedural guidelines for use in administrative segregation decisions, had used language of unmistakably mandatory character. Accordingly, this court must examine the statutory language and see if words such as "'shall,' 'will,' or 'must' [are] employed ...

[which] demands a conclusion that the State has created a protected liberty interest." Id. at 471-472.

Although the committee was composed of Kirkland only, there was no violation of the State mandates in this particular regard to the extent that the provisions requiring a committee of three are applicable only with respect to those institutions housing in excess of two hundred fifty prisoners. 7 N.Y.C.R.R. §252.1(f). In June of 1982, Lincoln's prison population was under two hundred. Therefore, a committee of one did not violate plaintiff's rights at that time.

Nevertheless, Kirkland's order that Bolden be placed in SHU amounted to a violation of Bolden's rights. A one-person Committee has no authority whatsoever to order confinement to SHU. 7 N.Y.C.R.R. §252.5(e). The applicable regulation provides that a one-person committee "may only impose the restrictions specified in paragraph (1) of this subdivision: (1) loss of

one or more specified privileges for a specified period not exceeding thirty days." Id.

Furthermore, "employee assistance" guidelines were ignored with respect to Bolden. The Regulations are clear that an investigation is to be conducted by the prison employee assigned to assist the inmate, and a written report setting forth the action taken and the results of the investigation is to be submitted to the person conducting the Superintendent's Proceeding prior to the commencement thereof. 7 N.Y.C.R.R. §253.3.

Morton was assigned to conduct the investigation of Bolden's defense. When Morton met with Bolden, she was provided with the names of the witnesses he wished to call. Morton made no effort to follow up on this information.

Finally, Bolden contends that Alston's dual role as investigator and arbiter of the charges violated his Fourteenth Amendment right to Due Process. In fact, Alston controlled every aspect of the Proceeding: he conducted it, he

interviewed the witnesses outside of Bolden's presence, he was the finder of fact, and he ultimately passed judgment thereon.

The New York Regulations in 1982 permitted this practice. However, the clearly established case law did not. See Wolff, supra and Powell I, supra. The governing regulation provided that the person who was to conduct the Proceeding was also to interview witnesses and others with direct knowledge of the incident. 7 N.Y.C.R.R. §253.4(c) (1970). In 1983, the prior regulations were repealed and the dual role was expressly abolished. 7 N.Y.C.R.R. §253.1. See 7 N.Y.C.R.R. §§253.1 et seq. filed June 13, 1983 effective June 15, 1983 which repealed 7 N.Y.C.R.R. §§253.1-253.5 filed September 17, 1970. The fact that New York waited approximately eight years to conform its regulations with constitutional mandates is of no import.

QUALIFIED IMMUNITY

The State raises the defense of qualified immunity. Additionally, Kirkland has

submitted an affidavit whereby he states, "At no time in the progress of the events related in the Complaint, and recorded in the other documents, did I act or intend to act to deprive Michael Bolden, Sr. of any rights he has by virtue of the Constitution of laws or the United States."

State officials have a right to qualified immunity for actions taken in their official capacity if they act in good faith and on the basis of a reasonable belief that their actions were lawful. Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974); Wood v. Strickland, 420 U.S. 308, 318-22 (1975). This qualified immunity has been interpreted to protect prison officials. Procunier v. Navarette, 434 U.S. 555, 561-62 (1978). Officials are not required to predict future developments in constitutional adjudication, and can be held liable only for actions which were unlawful at the time in issue. Procunier v. Navarette, supra, 434 U.S. at 562, 565; Pierson v. Ray, 386 U.S. 547, 557 (1967). State officials, however, may be charged

with constructive knowledge of the established law at that time. See, Wood v. Strickland, supra, 420 U.S. at 322; Procunier v. Navarette, supra, 434 U.S. at 562.

The defendants proffer several excuses for their virtually absolute[2] disregard of state and federal law. The excuses ignore, however, that "in [1982] an inmate facing a disciplinary hearing which could deprive him of substantial rights had an unequivocal right to adequate notice, an impartial tribunal and written statement of reasons and evidence relied upon" which included a qualified right "to present witnesses before an Adjustment Committee." McCann v. Coughlin, 698 F.2d 112 (2d Cir. 1983).

Accordingly, the Second Circuit in evaluating defendants' claim of good faith immunity, stated: "Whatever slight uncertainty there may have been [regarding an inmate's rights at an Adjustment Committee hearing], however, is insufficient to provide a legitimate basis for a claim of good faith immunity." Id. at 125.

Therefore, it is most disturbing that defendants again dredge up the claim that the prior decisions, such as Powell I, were limited to their particular facts. This argument has been rejected many times. Id. at 125. See also, Jacobson v. Coughlin, 523 F. Supp. 1247, 1254 (N.D.N.Y. 1981), affd., 668 F.2d 815 (2d Cir. 1982), cert. denied, 459 U.S. 834 (1982).

In accordance with this court's opinion that plaintiff's constitutional rights were "clearly established", defendants' claim of official good faith immunity is rejected.

CONCLUSION

Plaintiff was denied his right to procedural due process. Defendants' motion for summary judgment is denied. Plaintiff's cross-motion for summary judgment is granted.

The parties are directed to submit further briefs on the issues of injunctive relief and damages.

SO ORDERED.

Dated: Brooklyn, New York
May 13, 1986

/s/ Mark A. Costantino
U. S. D. J.

FOOTNOTES

1. There is no indication in the record that Bolden specifically requested the opportunity to call witnesses at the Adjustment Committee hearing. The record does, however, demonstrate that Bolden made such a request at the Superintendent's Proceeding.

2. As discussed infra, the "dual role" of the Superintendent was not abolished until after Bolden's hearings were concluded.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the sixth day of April one thousand nine hundred and eighty-seven.

MICHAEL A. BOLDEN, SR.,

Plaintiff-Appellee,

v.

AL ALSTON, Superintendent, Lincoln Correctional Facility, NATHANIEL HAYES, Sargeant and EDWARD KIRKLAND, Sargeant,

Defendants-Appellants.

[SEAL OF United States Court of Appeals, Second Circuit
Filed: Apr. 6, 1987]

Docket No. 86-2219

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Plaintiff-Appellee Michael A. Bolden,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the

judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

Pertinent Parts of Statutes Involved

[42 U.S.C.] § 1983.

Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

CONSTITUTION OF THE UNITED STATES, Amendment XIV.--Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appor- tionment of Representation; Disqualification of Officers; Public Debt; Enforcement.

"Section 1. . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . . .

[TITLE 7 N.Y. CODES, RULES AND REGULATIONS (in effect in June 1982)]

§ 252.1. Establishment of adjustment committees

". . . .

"(f) In any correctional facility with an inmate population of 200 or less the employee in charge of program or if such person be the superintendent, then

the superintendent or his designee shall perform the function of the adjustment committee."

§ 252.2. Role of the adjustment committee

"The basic purposes of the adjustment committee of a facility shall be as follows:

"(a) To ascertain the full and complete facts and circumstances of the incidents of inmate misbehavior alleged in reports to the superintendent;

"(b) To ascertain the underlying causes of each such incident;

"(c) To take appropriate steps to secure future compliance by such inmates with the policies of the department; and

"(d) To recommend to the superintendent such changes in programs and procedures of the facility as may seem desirable in order to eliminate, to the extent practicable, factors that tend to contribute to the causes of inmate misbehavior or to improve the methods of dealing with same."

§ 252.4. Dispositions by adjustment committee

"(a) All dispositions by the adjustment committee shall be in accordance with the provisions of this section.

"(b) . . . .

(2) where the committee is of the opinion that an inmate's behavior may have constituted a grave danger to

life, health or security or has constituted a danger to a substantial amount of property . . . the committee shall recommend to the superintendent that a superintendent's proceeding be held . . . ."

§ 252.5. Adjustment committee action

". . . .

"(e) . . . the committee may impose one or more of the following restrictions, except that a person performing the function of the committee, pursuant to subdivision (f) of section 252.1 of this Part, may only impose the restriction specified in paragraph (1) of this subdivision:

"(1) loss of one or more specified privileges for a specified period not exceeding 30 days. . . ."

§ 253.1. Authorization [superintendent's proceeding]

"(a) In any case where there is reasonable cause to believe that an inmate's behavior has constituted a danger to life, health, security or property, or that an inmate has deliberately failed or refused to follow the guidance and counseling of the adjustment committee, the superintendent may direct that a superintendent's proceeding be held. . . ."

§ 253.2. Formal charge and designation of presiding officer

". . . .

"(b) The formal charge shall consist of a written specification of the particulars of the incident of behavior involved . . . ."

§ 253.3. Notice and assistance to inmate

"(a) The person appointed to conduct the hearing shall designate an employee to furnish assistance to the inmate. This assistance shall be solely of an investigatory nature. . . .

"(b) Such employee . . . shall investigate any reasonable factual claim the inmate may make.

"(c) A written report of the action taken and the results of the investigation, if any . . . by the person designated to furnish assistance to the inmate shall be delivered to the person appointed to conduct the proceeding prior to the commencement of the procedure for determination of the charge."

§ 253.4. Method of determination

". . . .

"(b) . . . .

"(1) The inmate shall be permitted to call witnesses on his/her behalf, provided that so doing does not jeopardize institutional safety or correctional goals. . . ."

§ 300.2. Definitions

". . . .

"(b) Special housing unit. A cell or group of cells within a facility, maintained separate and apart from cells used by inmates in the general population, for confinement of inmates who are not in a program that permits them to commingle with the general inmate population. . . ."